STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2009
v	No. 283909 Livingston Circuit Court
VIRGIL MICLEA, Defendant-Appellant.	LC No. 07-016334-FH

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), and operating an automobile with a suspended license, MCL 257.904. We affirm. This appeal has been decided without oral argument. MCR 7.214(E).

The arresting officer noticed a car driving erratically and with inoperative license plate lighting on I-96 in Brighton. The officer performed a traffic stop and defendant, who was driving, admitted that he had a suspended license. Defendant's passenger, a woman, apparently also did not have a valid driver's license. After placing defendant under arrest, and preparing to impound defendant's car, the officer entered the interior of the car where he smelled marijuana. The officer, who was a canine handler, then brought his dog to defendant's car. A subsequent search revealed a black garbage bag containing four Ziplock gallon bags in the spare tire well of the car. Those bags contained approximately two pounds of marijuana. During a subsequent interview, defendant admitted that the marijuana belonged to him. The officer allegedly then asked defendant whether he was bringing the marijuana to Lansing to sell and defendant replied, "something like that."

During trial, defendant admitted that the marijuana belonged to him, but he contended that the marijuana was for his own personal use. He claimed that he used marijuana to self-medicate a prior brain surgery. He stated that he did not have insurance and maintained that the marijuana acted 'kinda like an antidepressant" to relieve his tension and control his mood swings and aggression. He maintained that he did not like to purchase marijuana frequently because it was dangerous to do so, and because it was cheaper to buy large quantities. He denied telling the officer that he planned to sell the marijuana in Lansing. Defendant claimed that he made a "bad judgment call" when he decided not to drop off the marijuana at his home.

Prior to trial, the prosecutor moved to suppress proposed defense testimony to support defendant's claim that he purchased the marijuana for personal use. During the hearing on the prosecutor's motion, defendant contended that he wanted to introduce physician testimony for the limited purpose of identifying the procedure that had been performed on defendant and that defendant's reported symptoms could occur with this type of procedure. Counsel indicated that he did not expect the physician to testify that defendant's symptoms would be treatable with marijuana, but that he was not sure, as he had not yet had a conversation with the physician. The trial court found this information irrelevant and granted the prosecutor's motion.

Defendant argues on appeal that the trial court's grant of the prosecution's pretrial motion to suppress his medical opinion testimony violated his constitutional right to present a defense. Although defendant argued below that he should be permitted to introduce the testimony because it was relevant and probative, he did not raise any constitutional claim. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Accordingly, this issue is not preserved, and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *People v Pipes*, 475 Mich 267, 278-279; 715 NW2d 290 (2006).

In *People v Unger (On Remand)*, 278 Mich App 210, 249-250; 749 NW2d 272 (2008), this Court stated:

> Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." *[People v] Kurr*, [253 Mich App 317, 326; 654 NW2d 651 (2002).]
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> However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "A defendant's interest in presenting . . . evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" *Scheffer*, *supra* at 308 (citations omitted). States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers*, *supra* at 302-303.
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> Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal

> trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer, supra* at 308, quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

Here, contrary to defendant's assertion on appeal, defendant did not, in fact, seek to introduce medical evidence to corroborate his claim that he was trying to treat his symptoms with marijuana, or that marijuana actually could be used as an alternative treatment to prescription medication. Instead, defendant sought to have a physician testify that he had an injury to his brain, and that the symptoms defendant reported could be caused by this type of injury. Defendant was permitted to introduce evidence concerning his alleged self-medication through his own testimony. Therefore, we do not find a clear infringement of defendant's right to present his chosen defense.

However, we also note that the trial court arguably abused its discretion when it upheld the prosecutor's motion to exclude the evidence. Contrary to the trial court's finding, evidence that defendant had suffered a brain injury, and that such an injury could cause symptoms such as those defendant reported, would have been relevant in assisting defendant in establishing his motive for possessing marijuana and his intent to personally use it. MRE 401. Although this testimony would have been cumulative to defendant's own testimony, it was probative in that the jury may well have found a physician more qualified to testify about the feasibility that defendant suffered the symptoms he reported. Thus, it should not have been excluded under MRE 403, for example.

Nevertheless, a preserved, nonconstitutional error does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); see also MCL 769.26; MCR 2.613(A). The error in the instant case cannot be said to be outcome-determinative. Both defense counsel and the prosecutor appeared to have access to defendant's medical records, and used them to question defendant. The prosecutor attempted to use the records to challenge whether defendant was informed that he could use marijuana to treat his symptoms, and whether the marijuana was actually effective. However, the parties did not appear to dispute the fact that defendant had sustained a prior brain injury, or that he suffered from symptoms.

In order for the jury to have acquitted defendant, it would have had to believe his assertion that he was purchasing the marijuana in bulk to save money or to cut down his chances of getting caught, that he had simply forgotten to remove the marijuana from his trunk before embarking on his journey, and that the officer lied about defendant's admission that he was going to sell the marijuana in Lansing. None of this would have been greatly affected by a physician's affirmation that defendant had suffered an injury and that symptoms such as defendant reported could be caused by this type of an injury. Under the circumstances, we find that defendant has not shown he is entitled to a new trial due to the trial court's decision to exclude defendant's proposed evidence.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey